In the District Court of the United States for the Northern District of Alabama

Civil No. 5499

JACK COLE CO., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3 of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] entered September 7, 1944, of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission. The Commission's report and order, dated January 14, 1943, granted appellant a certificate of public convenience and necessity under the "grandfather" clause of Section 206 (a) of Part II of the Interstate Commerce Act (49

[1] The court also made findings of fact and conclusions of law.

U. S. C. 306 (a)) to operate as a common carrier by motor vehicle of general Commodities over irregular routes as follows:

> Between Birmingham, Ala., and points within 15 miles of Birmingham, on the one hand, and, on the other, Detroit, Mich., Edwardsville, Kewanee and Litchfield, Ill., all points in Indiana, Ohio and Tennessee, those in that part of Illinois on, east, and south of a line beginning at Cairo, Ill., and extending along U. S. Highway 51 to La-Salle, Ill., thence along U. S. Highway 6 to Joliet, Ill., and thence along U. S. Highway 66 and Alternate 66 to Chicago, Ill., and thence in Georgia on and west of a line beginning at the Georgia-Florida State Line, and extending along U. S. Highway 41 to Atlanta, Ga., and thence along U. S. Highway 29 to the Georgia-South Carolina State Line.

This order, however, denied appellant's application in so far as it sought to operate from an enlarged base area embracing all points within 90 miles of Birmingham, on the one hand, and, on the other the points and territory outside of Alabama above mentioned, and, in addition thereto, Mobile, Louisville, New Orleans, and points within 20 miles thereof, Mississippi, North Carolina, the New York Commercial Zone and the Philadelphia Commercial Zone. An appeal was allowed on November 6, 1944. Service of the appeal papers upon appellee was not effected within

the five-day period prescribed by Rule 12, paragraph 2 of the Rules of the Supreme Court, for it was not until November 27, 1944, that the appeal papers were received by appellees.

The report and order of the Commission here attacked were issued on reconsideration, at appellant's request, of an earlier report of the Commission (32 M. C. C. 199), which had also denied appellant authority to operate in the same territory here involved. The basis for the Commission's action in refusing to grant the additional authority sought is indicated by the following statement from its opinion on reconsideration:

> In denying applicant the right to serve as a base territory points other than those in the Birmingham Area, it was pointed out that on or prior to June 1, 1935, approximately 88 percent of applicant's shipments were to or from points in the Birmingham Area; and that some few other Alabama points also were served, but that the service to or from any such point consisted generally of a single shipment. This figure of 88 percent is based on shipments from or to points in the radial area granted in the report on further hearing. If we take into consideration all shipments transported by applicant from or to all points in Alabama, the total percentage of shipments transported to or from the Birmingham Area would be approximately 92 percent.

Prior to June 1, 1935, applicant served Anniston, Gadsden, Gantts Quarry, Montgomery, Oxford, and Pell City, Ala., in the Highway Area, and Decatur, Hamilton, Huntsville, and Jasper, Ala., in the 90-mile Area. Of these points, Pell City, Decatur, and Huntsville were each served twice, Gadsden and Hamilton three times each but all in 1934, and the other points but once each. Since the statutory date, applicant has served more points in each of the two base areas requested but, with a few exceptions hereinafter discussed, the service to or from any such point consisted generally of from one to three shipments. Of the points served between June 2, 1935, and January 1940 (the date of the last shipments on the exhibits), in either of the two base areas, Anniston, Decatur, Gadsden, Montgomery, Oxford, Pell City, and Sylacauga, Ala., are the only points to or from which applicant has transported more than ten shipments since the statutory date. However, neither Oxford nor Pell City has been served since May 1937, and Sylacauga has not been served since 1938 except for one shipment in May 1939. As to the other four points, there is a lapse of almost a year at least in the service to or from any such point. Further, it is noted that applicant was found entitled in the initial report herein to serve as a base territory points in the Birmingham Area only, that it did not petition for any change in its base territory but filed

answers to the petitions seeking to have this proceeding reopened, and that it was at the further hearing that it sought an enlarged base area consisting of all points in Alabama and Georgia. We are of the opinion that applicant has not established that it is entitled to a larger base territory than that granted in the prior report. Compare *Howard Hall Co., Inc., Common Carrier Application,* 24 M. C. C. 273 (upheld by the Supreme Court in *Howard Hall Co.* v. *U. S.* 495.)

As seen, there is a lapse in operations to and from points in Mississippi of 7 months, to and from points in Louisiana of 18 months, and between points in Alabama of 10 months. No explanation of any of these hiatuses is offered except applicant claims that it had no intention to abandon operations to or from these points and that it held itself out to serve them. Section 206 (a) requires a finding of "bona fide operation * * * within the territory" not only "on June 1, 1935," but also "since that time." Applicant is not performing a highly specialized service but is a general commodity irregular route carrier. A mere holding out will not alone suffice to bridge the gaps of from 7 to 18 months in operations to and from these points, all of which are in reasonable proximity to applicant's base area, since applicant carries the burden of establishing its right to the statutory grant.

> Applicant's operations to and from the other points requested by it, namely, Louisville, points in the New York and Philadelphia Commercial Zones, and those in North Carolina, are reviewed briefly herein. Authority to serve these points was denied in the prior report. Summarizing, no shipments are shown between the Birmingham Area and Louisville after April 17, 1939, none during 1938 between the Birmingham Area and points in the New York Commercial Zone, none to or from North Carolina points after April 22, 1939, and none after July 10, 1939, to or from points in the Philadelphia Commercial Zone. Since the service performed in connection with operations to and from these points has not been continuous as required by the provisions of section 206 (a) of the act, we conclude that there has not been operation consistent with the claimed holding out, and that such holding out must be disregarded. Accordingly, we are of the opinion that the prior findings in respect of these points also must be affirmed.

As appears from appellant's jurisdictional statement, the principal grounds of attack upon the Commission's order are that it misapplied the law, particularly in recognizing that a lack of continuity short of an actual abandonment of the operations involved required denial of authority with respect to such operations, and that it acted arbitrarily and capriciously in excess of its statu-

tory power, and contrary to the indisputable character of the evidence. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

The legal standard to be employed by the Commission in determining the geographical scope of operations during the "grandfather" period is prescribed by the Supreme Court in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 480–481. There it was said that the Act provides the test of "bona fide operation" which connotes "substantial as distinguished from incidental, sporadic, or infrequent service." See also *Howard Hall Co.* v. *United States*, 315 U. S. 495, 498–499. Clearly, under this test service may be fatally insubstantial and noncontinuous without there having been an actual abandonment of operations. It is plain from the above-quoted portion of the Commission's report that it applied this standard.

Since the Commission has thus applied the correct legal test, its findings as to the continuity and substantiality of the service in particular areas must be sustained unless patently in error or not supported by substantial evidence. *Alton R. Co.* v. *United States*, 315 U. S. 15, 23; *United States* v. *Carolina Carriers Corp., supra*, 482–483. So far as the limitation of the Birmingham base area here involved is concerned, it is significant that the Supreme Court has sustained another Commission decision restricting the size of this same

base area, where the operations conducted in the larger area sought were much more substantial than they are here. *Howard Hall Co.* v. *United States, supra,* 498–499. In a particularly painstaking report the Commission has analyzed in detail the evidence with respect to every point and area involved. The District Court's conclusion that the Commission's findings were supported by substantial evidence is clearly correct and should be sustained.

For the foregoing reasons it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

(s) Charles Fahy,
CHARLES FAHY,
Solicitor General.

(s) Charles Fahy,
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

DECEMBER 1944.

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